IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION and STATE OF MINNESOTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

REPLY IN SUPPORT OF CERTIORARI

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I.

PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI WAS TIMELY FILED

Respondent, First of Omaha Service Corporation, argues (P. 5 of Respondent's Brief) that the Petition for Writ of Certiorari filed by Petitioner, The Marquette National Bank of Minneapolis (hereinafter sometimes called "Marquette"), with the United States Supreme Court on March 13, 1978, was not timely filed.

Under 28 U.S.C., §2101(c) (R App. A-1)[1] the period of time allowed for filing a Writ of Certiorari is 90 days from entry of judgment. 28 U.S.C., §2101(c), provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days *after the entry of such judgment or decree.* * * *" (Emphasis added).

The judgment of the Minnesota Supreme Court became final on December 14, 1977, when judgment was entered in this matter. It is from that date that the 90 days must be counted and the Petition for Writ of Certiorari filed by Marquette on March 13, 1978, with the United States Supreme Court was timely filed. Prior to December 14, 1977, no judgment of the Minnesota Supreme Court had been entered.

It should be noted that on November 10, 1977, the Minnesota Supreme Court rendered its decision (P App. A-29). Marquette then filed a Petition for Rehearing with the Minnesota Supreme Court which had the effect of staying entry of Judgment. Rule 140, Minnesota Supreme Court Rules (P[1] App. A-1). By Order dated December 8, 1977, the Minnesota Supreme Court denied the Petition of Marquette for rehearing. (P App. A-48). On December 14, 1977, judgment of the Supreme Court of the State of Minnesota was entered (P App. A-50) pursuant to Rule 136.-02, Minnesota Supreme Court Rules (P[1] App. A-1).

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[1]References to the appendix herein will be set forth as P App. for the appendix filed by Petitioner as part of its original Petition, R App. for the appendix filed by Respondent, and P[1] App. for the appendix made a part of this Reply Brief.

The Minnesota Supreme Court decision rendered on November 10, 1977, did not become final until entry of judgment on December 14, 1977, following denial by the Minnesota Supreme Court of Marquette's Petition for Rehearing on December 8, 1977. There was literally no judgment to appeal from, within the meaning of 12 U.S.C., §2101(c), until judgment was entered on December 14, 1977.

Rule 136.02 and Rule 140, Minnesota Supreme Court Rules (P[1] App. A-1) are substantially different from Rules 36 and 40 (a) of the Federal Rules of Appellate Procedure (P[1] App. A-2). The Clerk of a Federal Circuit Court of Appeals, under Rule 36, must prepare, sign and *enter* the judgment upon receipt of the opinion of the court and must mail on the date judgment is entered a copy of the opinion, if any, and notice of the date of entry of the judgment. Under Rule 40(a) of the Federal Rules of Appellate Precedure, a petition for rehearing must be filed within 14 days after *entry of judgment.* Minnesota Supreme Court Rules 136.02 and 140 provide that a petition for rehearing timely made *stays entry of judgment* and judgment shall be entered only after the petition for rehearing is decided.

Respondent, First of Omaha Service Corporation, cites *Citizens Bank of Michigan City v. Opperman,* 249 U.S. 448, (1919) (at P. 6 of Respondent's Brief) for the proposition that the decision of the Minnesota Supreme Court became "final" on December 8, 1977, when the Minnesota Supreme Court rendered its decision denying Marquette's Petition for Rehearing. If judgment had been entered after the Minnesota Supreme Court decision rendered on November 10, 1977, but prior to the Petition

for Rehearing, it would make sense under 28 U.S.C., §2101(c), to compute the 90 days from the date of denial by the Minnesota Supreme Court of Marquette's Petition for Rehearing since, under such circumstances, there would have been no further act necessary to make the judgment final. However, the Minnesota Supreme Court Rules do not follow the Federal Rules of Appellate Procedure or appellate rules of other state courts in providing for entry of judgment prior to a petition for rehearing, and hence the United States Supreme Court decision in *Citizens Bank of Michigan City v. Opperman, supra,* and other cases cited by Respondent, First of Omaha Service Corporation, at page 6 of its Brief, are inapposite.

The United States Supreme Court in *Puget Sound Power & Light Co. v. King County,* 264 U.S. 22 (1924) has made it quite clear that where state law provides for entry of judgment only after the highest state court has decided a petition for rehearing, the time for filing a petition for writ of certiorari to the United States Supreme Court under 12 U.S.C., §2101(c), runs from the date of entry of the judgment.

In the *Puget Sound* case, *supra,* the Washintgon Supreme Court sat in two departments and en banc. The second department rendered its opinion October 15, 1921. The case was reargued before the court en banc, which, in a per curium opinion filed *June 12, 1922,* approved the decision of the second department and affirmed the judgment. On *July 10,* 1922, judgment of the Washington Supreme Court was entered in the minutes of the court. Respondent, King County, argued that the time for computing the 90 days began to run from the filing of the per curiam opinion on June 12, 1922 (rather than from the

date of judgment entered on July 10, 1922) and that the period for filing a writ of certiorari (writ of error) thus expired on September 12, 1922, whereas the petition for writ of certiorari was not filed until September 22, 1922. The United States Supreme Court held that under the laws of the State of Washington, a decision of the Department of the Supreme Court of Washintgon did not become final until 30 days after it was filed, during which time a petition for rehearing could be filed. If no rehearing was asked for, or no order entered for a hearing en banc, in the 30 days, the decision became final. If a hearing en banc was ordered and had, the decision was final when filed; but in all cases when the decision became final, there was a specific provision that a judgment shall issue thereon. The United States Supreme Court said that however final the decision might be, it was not the *judgment* and that the time for appeal ran from the date of entry of judgment. To the same effect, see *Scofield v. National Labor Relations Board,* 394 U.S. 423 (1969).

II.

CONCLUSION

In view of the foregoing, Petitioner, The Marquette National Bank of Minneapolis, respectfully submits that it seasonably filed its Petition for Writ of Certiorari with the United States Supreme Court within the time permitted under 28 U.S.C., §2101(c), that is, within 90 days from date of entry of judgment by the Minnesota Supreme Court.

Respectfully submitted,

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APPENDIX

Rule 136.02, Minnesota Supreme Court Rules.

136.02 *Entry of Judgment; Stay*

The clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment.

Rule 140, Minnesota Supreme Court Rules.

Rule 140. *Petition for Rehearing.*

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days thereafter. Oral argument in support of the petition will not be permitted. Thirteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of $25 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until dis-

position of such petition. It does not stay the taxation of costs.

Rule 36, Federal Rules of Appellate Procedure.

Rule 36. *Entry of Judgment*

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Rule 40(a), Federal Rules of Appellate Procedure.

Rule 40. *Petition for Rehearing*

(a) *Time for Filing; Content; Answer; Action by Court if Granted.* A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received un-

less requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

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